(3)

No. 06-1360

FILED
MAY 24 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

MACY'S DEPARTMENT STORES, INC., et al.,

Petitioners,

v.

CITY AND COUNTY OF SAN FRANCISCO,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of the State of California, First Appellate District

BRIEF FOR AMICUS CURIAE INSTITUTE FOR PROFESSIONALS IN TAXATION IN SUPPORT OF PETITIONERS

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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BRIEF FOR AMICUS CURIAE INSTITUTE FOR PROFESSIONALS IN TAXATION IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae the Institute for Professionals in Taxation ("IPT"), founded in 1976, is a non-profit educational association of taxation professionals whose over 4400 members represent approximately 1450 corporations, firms, and other taxpayers throughout the United States and Canada.[1] It is the only professional organization that educates, certifies, and establishes strict codes of conduct for state and local income, property, and sales tax professionals who represent taxpayers. IPT members represent business and industry sectors of

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amicus curiae and its members, made a monetary contribution to the preparation or submission of this brief. This brief is filed with the consent of the parties, whose letters of consent have been filed with the Clerk.

all sizes, from small firms to most Fortune 500 companies. IPT is dedicated to uniform and equitable tax administration and to minimizing the cost of tax administration and compliance. IPT's members examine public policy and legal issues that affect the taxation of businesses to ensure that such taxation reflects sound economic and social principles.

IPT and its members have a significant interest in this case, which threatens to deprive taxpayers of the "clear and certain" remedy for unconstitutional taxation that this Court has long held is required under federal law. Under the decision below, a locality that had no constitutional authority to levy a tax can nevertheless deny taxpayers subjected to that unlawful tax all but the most minimal refund based on a court's hypothesis of what a constitutional taxing scheme might have looked like. This is the very definition of an unclear and uncertain remedy, and such a rule may effectively deter all but the most determined taxpayers from contesting unlawful taxes. IPT therefore urges the Court to grant certiorari and reaffirm the settled principle that due process requires a full refund of improperly apportioned taxes that impermissibly burden interstate commerce.

SUMMARY OF THE ARGUMENT

This Court has consistently held that a full refund is the "clear and certain remedy" required when taxing authorities have exceeded their constitutional bounds by imposing improperly apportioned taxes that unlawfully burden interstate commerce. The lower court in this case disregarded that settled rule and instead allowed respondent to construct a remedy based on estimates of tax burdens that might have been imposed under a hypothetical tax regime. This manifest disregard of this Court's precedents warrants the Court's review. Although the Court has permitted taxing authorities limited flexibility to reformulate discriminatory taxes by increasing taxes on favored local taxpayers rather than awarding refunds, it has never wavered from the rule that requires full refunds where, as here, a taxing authority has exceeded

its constitutional authority by impermissibly burdening interstate commerce with an invalid unapportioned tax.

This Court's intervention is particularly important because the decision below sets a dangerous precedent that would provide incentives for like-minded states and localities to enact unlawful taxes with virtual impunity. The historical record demonstrates that taxing authorities will go to extraordinary lengths to deny, delay, or recoup refunds of even concededly unlawful taxes. Time and again, this Court has directed states to afford clear and certain remedies for unconstitutional taxes, only to confront further attempts to avoid the consequences of such enactments. The remedy approved in this case is the latest such effort, and it injects intolerable uncertainty into the law by making the remedy for an obvious constitutional violation depend on a hypothetical calculation of a detrimental economic effect. Estimating this hypothetical effect in advance of litigation will be difficult, if not impossible, and such a speculative remedy will mean that taxpayers have little incentive to raise a legal challenge. Such a rule will thus encourage states and localities to unfairly burden interstate commerce so long as the hypothetical burden attributed to any one taxpayer is less than the cost of challenging the unconstitutional tax.

The continuing attempts by taxing authorities to avoid refunding amounts collected under illegal tax schemes underscore the need for clarity and certainty in defining the appropriate remedy for unlawful taxes. And given the strong incentive for those taxing authorities to apportion themselves an unwarranted share of taxes from interstate commerce, there is no better deterrent than the well-established obligation to refund any sums collected under such invalid schemes. IPT is dedicated to ensuring transparent and predictable rules of taxation, and this Court's requirement of a "clear and certain" remedy for unconstitutional taxation serves that goal. By contrast, the decision below undermines that goal in contravention of this Court's precedents.

IPT therefore urges the Court to review and reverse the decision below in order to prevent states and localities from employing a dangerous new weapon to avoid their obligations under federal law.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW DEPARTS FROM THIS COURT'S WELL-SETTLED RULE THAT A FULL REFUND IS THE ONLY CLEAR AND CERTAIN REMEDY IN THESE CIRCUMSTANCES.

Nearly a century ago, this Court decreed, in the words of Justice Holmes, that "a man who denies the legality of a tax should have a clear and certain remedy." *Atchison, Topeka & Santa Fe Ry.* v. *O'Connor*, 223 U.S. 280, 285 (1912). Thus, where the taxpayer is unable to enjoin the collection of unlawful taxes, as here, "an action at law to recover back what he has paid is the alternative left." *Id.* In the years since, the Court has refined its test for determining whether a tax unconstitutionally burdens interstate commerce, but it has never wavered from the fundamental rule that the clear and certain remedy for such a tax, required by the Due Process Clause, is a full refund. *See McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 39 (1990) (where tax is "beyond the State's power to impose, as was the unapportioned tax in *O'Connor* * * * no corrective action by the State could cure the invalidity of the tax during the contested tax period"); *J.D. Adams Mfg. Co.* v. *Storen*, 304 U.S. 307, 314 (1938) ("the statute cannot constitutionally be enforced"); *Carpenter* v. *Shaw*, 280 U.S. 363, 369 (1930) ("[A] denial by a state court of recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment."); *Montana Nat'l Bank* v. *Yellowstone County*, 276 U.S. 499, 504-05 (1928) ("[The Bank] cannot be deprived of its legal right to recover the amount of tax unlawfully exacted of it.").

The court below departed from this settled rule, and that departure warrants this Court's review. As the case comes to this Court, it is conceded that San Francisco's "tandem tax" was unlawful because it impermissibly burdened interstate commerce by seeking to tax more than the City's fair share of that commerce. The Commerce Clause prevents taxing authorities from "singl[ing] out interstate trade for hostile action." *Freeman* v. *Hewit*, 329 U.S. 249, 252 (1946). But it also prevents them "from taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States." *Id.* San Francisco's tax contravenes that latter prohibition. As conceded by respondent (Pet. App. 8a), and as found by the lower courts, the tax was unconstitutional because it failed this Court's "internal consistency" test. As the petition explains, under this Court's precedents such a tax impermissibly burdens interstate commerce because, if it were adopted nationwide, an interstate company bears a larger tax burden than a wholly intrastate company with the same revenues. *See* Pet. 5-6.

In *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, *supra*, this Court reaffirmed Justice Holmes' dictate that there must be a "clear and certain" remedy for an unconstitutional tax. 496 U.S. at 32 (quoting *O'Connor*, 223 U.S. at 285-86). Even more importantly, *McKesson* also reiterated that where a tax is "beyond the State's power to impose, as was the unapportioned tax in *O'Connor* * * * no corrective action by the State could cure the invalidity of the tax during the contested tax period." *Id.* at 39. Thus, for improperly apportioned taxes that impermissibly burden interstate commerce, like those at issue in *O'Connor* and here, a full refund is required because such taxes are "beyond the State's power to impose." *Id. See also Meyer* v. *Wells, Fargo & Co.*, 223 U.S. 298, 302 (1912) (state has "no right to tax" unapportioned gross receipts from interstate commerce); *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U.S. 194 (1905); *California* v. *Pac. R.R. Co.*, 127 U.S. 1 (1888). Just as a state has no authority to tax property in

another state, *O'Connor*, 223 U.S. 280, or lands allotted to Native Americans by a federal treaty, *Ward* v. *Bd. of County Comm'rs*, 253 U.S. 17 (1920), a locality has no authority to tax more than its fair share of interstate commerce. *See, e.g.*, *American Trucking Ass'ns* v. *Scheiner*, 483 U.S. 266, 284 (1987); *Evco* v. *Jones*, 409 U.S. 91 (1972); *Gwin, White & Prince, Inc.* v. *Henneford*, 305 U.S. 434 (1939). This is consistent with the settled rule that "[a]n unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is * * * as though it had never been passed." *Norton* v. *Shelby County*, 118 U.S. 425, 442 (1886).

The Court observed in *McKesson* that a taxing authority has a limited ability to remedy a discriminatory tax by systematically reformulating its taxation system. 496 U.S. at 39-41. *McKesson*, however, also clearly reaffirmed the settled rule that a full refund is required where, as here, that taxing authority has not merely enacted a discriminatory tax but has reached beyond its constitutional boundaries and enacted an entirely invalid tax scheme in an attempt to tax more than its fair share of interstate commerce. *Id.* at 39. Non-discrimination is but one of four requirements for a constitutional tax. A tax is lawful under the Commerce Clause only if it is "[1] applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 279 (1977). Although San Francisco's tandem tax also had the practical effect of discriminating against interstate commerce, the "internal consistency" test that it failed implicates not the non-discrimination prong of the *Complete Auto* test, but rather the apportionment requirement. *See Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 184-85 (1995). As the Court has held, "[a] failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes * * *." *Id.* at 185.

Thus, as an improperly apportioned and therefore invalid tax, San Francisco's tandem tax is subject to the full refund requirement set forth by Justice Holmes in *O'Connor*, which likewise involved an attempt by a taxing authority to tax more than its fair share of interstate commerce. That makes perfect sense. A discriminatory tax could in theory (but likely not in practice) be reformulated on a systemwide basis to retroactively subject local interests to a higher tax and thereby alleviate the past discrimination without the necessity of refunds. But a tax that fails the internal consistency test imposes a structural obstruction on interstate commerce whose past harms cannot be alleviated just by eliminating the invalid tax. For such taxes, "it is immaterial that local commerce is subjected to a similar encumbrance." *Freeman*, 329 U.S. at 252; *see also Am. Trucking Ass'ns*, 483 U.S. at 285 (where tax violates internal consistency test, tax is invalid without any showing that other jurisdictions imposed similar taxes). The "[u]nlawfulness of the burden depends on [the tax's] nature, measured in terms of its capacity to obstruct interstate commerce, and not on the contingency that some other state may first have subjected the commerce to a like burden." *Gwin, White & Prince*, 305 U.S. at 440.

Furthermore, this Court has rejected the notion that a state may reformulate its tax through the judicial process based on the state's speculation of what part of the unconstitutional tax burden was borne by an individual plaintiff, as was done by the lower courts here. In *Meyer* v. *Wells, Fargo & Co.*, *supra*, it was argued that an unfairly apportioned tax should not have been enjoined unless the taxpayer was made to pay the portion of the tax which hypothetically would have been owed if the tax had been enacted in a constitutional form. The Court rejected that argument, holding that

> we see no possible construction on which [the tax] could be upheld without being so remodeled that it would be a mere speculation whether the legislature would have passed it in the new form. * * * Neither the court below nor this court can reshape the statute simply because it

> embraces elements that it might have reached if it had been drawn with a different measure and intent.

223 U.S. at 302.

The same reasoning applies foursquare to this case. Because San Francisco had no authority to burden interstate commerce in this manner, the entire tandem tax is invalid and San Francisco must refund the taxes that it unlawfully collected. As was held in *Meyer*, there is no authority for a court to "reshape the statute" based on "mere speculation." *Id.* The taxpayers represented by IPT and its members depend on a transparent and predictable system of taxation, and that includes the "clear and certain remedy" decreed by this Court for taxes that impermissibly burden interstate commerce. *O'Connor*, 223 U.S. at 285. The complex and ultimately paltry remedy adopted below, which was based on hypothetical speculation as to the effect of a fictional tax regime adopted nationwide, is anything but clear and far from certain. "The immunities implicit in the Commerce Clause and the potential taxing power of a State can hardly be made to depend, in the world of practical affairs, on the shifting incidence of the varying tax laws of the various States at a particular moment." *Freeman*, 329 U.S. at 256. The Court should therefore grant certiorari to clarify the confusion engendered by the decision below, and to reaffirm that due process requires full refunds when a taxing authority has impermissibly burdened interstate commerce by enacting a constitutionally invalid tax scheme.

II. THE DECISION BELOW FOSTERS INTOLERABLE UNCERTAINTY AND INCREASES THE ALREADY SUBSTANTIAL INCENTIVES FOR STATES TO ENACT UNLAWFUL TAXES.

The historical record is unfortunately littered with instances of recalcitrant states enacting unlawful taxes and then throwing roadblock after roadblock in the way of taxpayers seeking the clear and certain remedy promised them by the

Constitution and this Court's precedents. IPT is concerned that the decision below, if not corrected, will open a new chapter in this regrettable saga. As San Francisco has so far been able to do, states and localities will enact unconstitutional taxes safe in the knowledge that a monetary remedy will be speculative at best even if the tax is eventually declared illegal. Since only the most doggedly persistent taxpayers will be able to gamble on such an uncertain remedy, the predictable result will be an increase in illegal taxes and a concomitant burden on interstate commerce. These commonsense observations affirm the reasoning of Justice Holmes "that experience is the test by which it is decided whether the degree of danger attending given conduct under certain known circumstances is sufficient to throw the risk upon the party pursuing it." Oliver Wendell Holmes, *The Mind and Faith of Justice Holmes* 63 (1948).

A. States Have Shown That They Will Employ Any Available Means To Avoid Paying Refunds Of Unlawful Taxes.

States have enormous incentives to tax more than their fair share of interstate commerce and have attempted to do so since the earliest days of the Union. *See, e.g.*, *Brown* v. *Maryland*, 25 U.S. 419 (1827); *Henderson* v. *New York*, 92 U.S. 259 (1875); *Philadelphia & So. Steamship Co.* v. *Pennsylvania*, 122 U.S. 326 (1887). Indeed, the lure of such taxation is so great that this Court has described determining the validity of such tax schemes as a "perennial problem." *Colonial Pipeline Co.* v. *Traigle*, 421 U.S. 100, 101 (1975). As this case shows, there has also been a perennial problem with states seeking to manipulate remedial doctrines to deny taxpayers relief. Despite this Court's seemingly clear precedents, a taxpayer's ability to recover unlawfully collected taxes has been anything but clear and certain. The typical response of states to the invalidation of unconstitutional tax schemes has not been to cease the enactment of such schemes and provide prompt refunds of any taxes

illegally collected. Instead, the response has often been to use legislation or distort legal doctrines to avoid paying, severely circumscribe, or recoup any refunds.

For example, Pennsylvania went to great lengths in an attempt to keep taxes that had been illegally collected under this Court's decision in *American Bank & Trust Co.* v. *Dallas County*, 463 U.S. 855, 862-63 (1983). In that case, the Court invalidated a Texas tax on bank shares, and the Pennsylvania Supreme Court promptly overturned Pennsylvania's nearly identical tax. *See Dale Nat'l Bank* v. *Commonwealth*, 465 A.2d 965, 967 (Pa. 1983). In response, the Pennsylvania legislature enacted a one-time excise tax on banks, which was not only exactly equal to the revenues lost when the prior tax was declared invalid but also expressly designed to replace the invalidated tax. *See Fidelity Nat'l Bank, N.A.* v. *Commonwealth*, 645 A.2d 452, 455 (Pa. Commonw. Ct. 1994). More than six years later, the Pennsylvania Supreme Court invalidated this substitute tax as a "thinly veiled attempt" to tax indirectly what the Commonwealth could not tax directly under *American Bank & Trust*. *See First Nat'l Bank* v. *Commonwealth*, 553 A.2d 937, 944 (Pa. 1989).

Undaunted, the Pennsylvania legislature then enacted a new tax on bank shares for one year at approximately ten times the previous rate, while exempting newly chartered banks that had not been subject to the two previous unconstitutional taxes and had therefore not received a refund. *See Fidelity Nat'l Bank*, 645 A.2d at 455. Thus, the only banks effectively subject to the new tax were those that had previously incurred the unconstitutional taxes and had become entitled to refunds. *Id.* The Pennsylvania courts eventually struck down this tax under state law. *Id.* at 463. Only after three failures in the courts and eleven years of litigation did Pennsylvania finally concede that it could not retain the taxes this Court had declared illegal in *American Bank & Trust*.

Florida exhibited similar behavior in response to this Court's ruling in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), which invalidated a Hawaii state tax preference for local products. Immediately after that decision, Florida revised its nearly identical tax preference for liquors made with "Florida-grown" citrus and other crops to a preference for products containing specified ingredients all of which are commonly grown in Florida. The Florida Supreme Court invalidated that tax but refused to order a refund because it concluded that the state was entitled to rely on a presumptively valid statute and that a refund would amount to a windfall. *See McKesson*, 496 U.S. at 25-26. In *McKesson*, this Court rejected these conclusions and held that the Fourteenth Amendment requires the states to provide "meaningful backward looking relief to rectify any unconstitutional deprivation." *Id.* at 31.

Unfortunately, the ink was barely dry on *McKesson* before this Court confronted another attempt by a state to avoid paying refunds of taxes held invalid in *Bacchus*. The state of Georgia attempted to avoid providing any remedy for taxes collected in violation of *Bacchus* on the theory that the *Bacchus* ruling should be applied only prospectively, and the Georgia Supreme Court endorsed that theory. But in *James M. Beam Distilling Co.* v. *Georgia*, 501 U.S. 529 (1991), this Court reversed that ruling, holding that federal law required a retrospective remedy.

Barely three years later, however, this Court again confronted a state's attempt to avoid refunding taxes it had illegally collected. Prior to 1989, Virginia, like many other states, had a state income tax that exempted benefits from state but not federal retirement plans. In *Davis* v. *Michigan Dept. of Treasury*, 489 U.S. 803 (1989), this Court held that such tax exemptions were illegal. Many states repealed their state retirement tax exemptions, but only a few refunded the taxes that had been illegally collected. For its part, the Virginia Supreme Court sought to deny Virginia taxpayers re-

funds on the ground that *Davis* required only prospective relief. In *Harper* v. *Virginia Department of Taxation*, 509 U.S. 86 (1993), this Court reversed, holding that *Beam* mandated retroactive application of *Davis*. Only then did the Virginia Supreme Court agree that refunds were required. *See Harper* v. *Virginia Dep't of Taxation*, 462 S.E.2d 892 (Va. 1995).

Harper, though, did not end attempts by states to avoid paying refunds of taxes collected in violation of *Davis*. Georgia had earlier convinced its supreme court to deny refunds on the ground that the Georgia refund statute did not apply to instances in which the tax law was ruled unconstitutional or otherwise invalid. In *Reich* v. *Collins*, 513 U.S. 106 (1994), this Court reversed, holding that due process prohibited Georgia from reinterpreting its refund statute in the middle of a dispute. *Id.* at 111 (Georgia may not reconfigure its remedial scheme "unfairly, in mid-course"). As the Court held, states may not hold out a post-deprivation remedy for illegally collected taxes and then declare that remedy unavailable as soon as the taxes are paid. *Id.*; *accord Newsweek, Inc.* v. *Florida Dep't of Revenue*, 522 U.S. 442 (1998).

Just as it was in *McKesson*, *Beam*, *Harper*, and *Reich*, it is particularly important for this Court to intervene to ensure an effective remedy here. Because of the Tax Anti-Injunction Act, 26 U.S.C. § 7421(a), almost all challenges to state and local taxes must be brought in state courts, and this Court therefore provides the only opportunity for federal court review of federal constitutional issues in such cases. Although the state courts are, for the most part, conscientious in carrying out their obligations under federal law, the history recounted above demonstrates that they are often reluctant to afford clear and certain remedies for unconstitutional taxes unless and until directly instructed by this Court to do so.

Indeed, taxing authorities have continued to employ legal chicanery in an attempt to outlast taxpayers and avoid refunds of unlawful taxes. For example, in *South Central Bell Telephone Co.* v. *Alabama*, 526 U.S. 160 (1999), this Court

invalidated an Alabama franchise tax scheme, but after another eight years of litigation taxpayers subjected to that tax have yet to see a penny in court-ordered refunds. The Alabama Supreme Court first forced affected taxpayers to file hundreds of individual claims, holding that tax refunds could not be litigated on a classwide basis. *See Patterson* v. *Gladwin Corp.*, 835 So. 2d 137, 154 (Ala. 2000). And only recently, a trial court in one of those cases held that a taxpayer subject to the scheme invalidated in *South Central Bell* has no standing to seek any refund because that taxpayer allegedly had no instate competitors favored under the invalid tax. *See Vulcan Lands, Inc.* v. *Surtees*, No. CV-2001-1106-PR (Al. Cir. Ct. Mar. 12, 2007) ("Plaintiff offered no specific evidence of a domestic competitor, and consequently there is no injury and therefore no refund due."). The Supreme Judicial Court of Massachusetts has also concluded that plaintiffs who paid taxes under an invalidated tax scheme were not entitled to a refund because the plaintiffs had failed to show that they were individually adversely affected. *Textron, Inc.* v. *Comm'r of Revenue*, 756 N.E.2d 1142, 1144 (Mass. 2001) (denying relief and noting that "[t]o date, there has been no legislative remedy to the constitutional flaws" in the illegal tax scheme).

Similarly, as the petition notes (Pet. 26-27), despite this Court's invalidation of a Washington tax in *Tyler Pipe Indus., Inc.* v. *Washington Dep't of Revenue*, 483 U.S. 232 (1987), that state dragged taxpayers through twelve years of litigation and legislative activity and ultimately convinced its supreme court to deny any refunds. First, the state persuaded its supreme court to apply *Tyler Pipe* only prospectively, thereby depriving the affected taxpayers any remedy for taxes collected prior to that decision. *National Can Corp.* v. *Dep't of Revenue*, 749 P.2d 1286 (Wash. 1988). Although the Washington Supreme Court reversed itself eight years later and concluded that *Tyler Pipe* applied retroactively, *Digital Equip. Corp.* v. *Dep't of Revenue*, 916 P.2d 933 (Wash. 1996), it again determined that no refunds were nec-

essary because the state legislature had enacted a revised tax scheme within weeks of the *Tyler Pipe* decision. This revised scheme limited the remedy for the taxes illegally collected prior to *Tyler Pipe* to tax credits for any duplicative taxes paid to another state. *Id.* at 941. But the litigation did not end there because the state had continued to collect the invalid tax in the weeks between this Court's *Tyler Pipe* decision and the legislative enactment. Instead, it was not until 1999 that the state finally closed the door on the taxpayers' hopes of seeking even this severely circumscribed remedy. In *W.R. Grace & Co.* v. *Dep't of Revenue*, 973 P.2d 1011 (Wash. 1999), the Washington Supreme Court upheld the legislature's retroactive statutory amendment denying even the limited refund for the illegal taxes collected after the *Tyler Pipe* decision and before the statutory enactment. These taxpayers too were limited to only a credit for any essentially identical taxes paid to other jurisdictions. *Id.*

For its part, the Kentucky legislature has amended its tax refund statute three times to avoid paying refunds to taxpayers who overpaid taxes between 1988 and 1995. The first amendment followed *GTE* v. *Revenue Cabinet*, 889 S.W.2d 788 (Ky. 1994), which invalidated a Kentucky tax. The amendment effectively prohibited payment of any post-*GTE* refund claims from 1996-1998. *See Johnson Controls, Inc.* v. *Rudolph*, 2006 Ky. App. LEXIS 132, *4 (Ky. Ct. App. 2006). After that amendment was ruled unconstitutional, the legislature allowed it to expire. *Id.* The legislature then amended the refund statute to limit the time for filing refund claims and thus effectively extinguish pending *GTE* refund claims. *Id.* at *5. The Kentucky Court of Appeals determined that this second amendment was invalid because it violated due process. *Id.* at *17. But Kentucky's efforts to deny refunds still continue: in March 2007, the Governor of Kentucky signed a third amendment to Kentucky's tax refund statute, which withdrew the state's waiver of its sovereign immunity for suits seeking refunds under the *GTE* case. *See* 2007 Ky. Acts 22, 1.

B. The Decision Below Creates Intolerable Uncertainty As To The Proper Remedy For Unconstitutional Taxes.

San Francisco, and California through its courts, have now joined the ranks of states and localities seeking to avoid the consequences of unlawful taxation. The California courts had earlier held that full refunds were required following the invalidation of nearly identical tandem taxes. *See Union Oil Co.* v. *City of Los Angeles*, 79 Cal. App. 4th 383 (Cal. Ct. App. 2000); *General Motors Corp.* v. *City & County of San Francisco*, 81 Cal. Rptr. 2d 544 (Cal. Ct. App. 1999); *General Motors Corp.* v. *Los Angeles*, 35 Cal. App. 4th 1736 (Cal. App. 1995). Yet the court below—in contravention of this Court's decisions in *Reich* and *Newsweek*—has now reinterpreted California's refund statute in the midst of a dispute to deny a right to full refunds. As the petition explains, the conflict with both the decisions of this Court and those of other states is sufficient reason to grant certiorari. But in addition, the particular method employed to avoid refunds in this case, if allowed to stand, will foster intolerable uncertainty that itself denies taxpayers a clear and certain remedy.

San Francisco was on notice that its tandem tax scheme was invalid as early as 1995, when a similar scheme employed by Los Angeles was invalidated. And San Francisco did not cease collecting taxes under its invalid scheme until the 2000 tax year, two years after this litigation commenced. *See* Pet. App. 3a. Yet according to the court below, all that San Francisco had to do to remedy five years of knowing constitutional violations was to refund what it estimated to be the relatively small additional economic burden borne by petitioners over wholly local taxpayers, assuming the hypothetical nationwide adoption of a tandem tax and a complex formula to allocate petitioner's costs and revenues under that fictional tax structure. In essence, the court engaged in judicial reformation of the tax scheme to approximate what

the court surmised the San Francisco legislature might have done had it not acted unconstitutionally in the first place.

"[T]he appropriate level or rate of taxation is essentially a matter for legislative, and not judicial, resolution." *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 627 (1981). That rule is particularly important to follow here, given that taxpayers are entitled, in Justice Holmes' formulation, to "a clear and certain remedy" for unconstitutional taxes. The remedial scheme adopted below permits a state to enact and maintain an obviously invalid tax scheme, collect the taxes until the scheme is successfully challenged in court, and then avoid all but the most minimal refunds based on hypothetical calculations done on a case by case basis. The whole inquiry, moreover, will devolve into a battle of economic expert witnesses. Taxpayers like petitioners will be left to guess in advance what their actual burden is under the tax scheme and to determine whether that speculative remedy is worth the costs of mounting a legal challenge to that scheme.

Only the most persistent taxpayer will be able to navigate such a tortuous course to its completion, and states will often be able to outlast their victims through sheer obstinacy. For example, in the Alabama *South Central Bell* litigation, many affected taxpayers settled for pennies on the dollar and others have been denied any refunds after twenty-one years of litigation, with additional years of appeals on the horizon. In the *Tyler Pipe* litigation, more than a decade of litigation ended with no refunds, only uncertain prospective credits. In the Pennsylvania litigation following this Court's decision in *American Bank & Trust*, refunds were finally awarded but only after eleven years of court battles and legislative obstruction. And in Kentucky, because the state legislature has continued to amend its tax refund statute rather than pay the refunds due under the Kentucky Supreme Court's 1994 decision in *GTE*, it is unclear whether the affected taxpayers will ever recover any refund. This Court should put a stop to this kind of gamesmanship by granting certiorari in this case

and confirming that "a clear and certain remedy," *O'Connor*, 223 U.S. at 285, does not include judicial speculation about hypothetical tax schemes. Such a hypothetical remedy, which is difficult if not impossible for any taxpayer to estimate in advance, is effectively no remedy at all.

A clear and certain remedy is also necessary to deter states from embarking on unconstitutional schemes in the first place. *See* John Coverdale, *Remedies for Unconstitutional State Taxes*, 32 Conn. L. Rev. 73, 76 (Fall 2000) (best deterrence to such schemes is the obligation to return the unconstitutionally collected taxes, with interest); *cf. Owen* v. *City of Independence*, 445 U.S. 622, 651-52 (1980) (municipal liability for constitutional violation will "create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights"). Such deterrence is very important in a case, like this one, involving an undue burden on interstate commerce. In *American Trucking Ass'ns*, *supra*, this Court struck down a Pennsylvania flat tax on trucks on the ground that it violated the internal consistency test. The Court noted that if every state imposed such a tax, the "inevitable effect is to threaten the free movement of commerce by placing a financial barrier around [each State]," and observed that such barriers had already begun to be erected. 483 U.S. at 284. Indeed, soon after Pennsylvania had enacted its flat tax in 1980, six other States had adopted flat taxes and seven had adopted retaliatory levies that applied to trucks based in Pennsylvania or any other flat tax state. *Id.* at 285-86. Denying effective remedies for such unlawful taxes will foster similar ill effects, as states and localities come to understand that the costs of imposing such illegal enactments are relatively small.

While it is true that the states have some freedom to choose the appropriate backward looking relief in cases of discrimination, that flexibility cannot obliterate the available remedy as was done here. The remedy for taxes collected under

schemes that impermissibly burden interstate commerce by carving out more than their fair share of tax should not turn on hypotheticals dreamed up by the taxing authority. The lower court's departure from the settled rule that a full refund is the only clear and certain remedy for such invalid taxes is contrary to this Court's precedents, creates dangerous incentives, and warrants this Court's review.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, the petition should be granted and the judgment below reversed.

Respectfully submitted,

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